

Ratio. Juris

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and Philosophy of Law

Edited by Enrico Pattaro

Values

GEORG HENRIK VON WRIGHT and ALBERTO ARTOSI discuss the emotivist theory of valuations.

Legal Reasoning

KAY GOODALL compares statutory interpretations in the British Isles.

RAUNO HALTTUNEN stresses legal justification as a process of discovery.

MATTI ILMARI NIEMI appraises practical wisdom in legal argumentation.

Notes • Discussion • Book Reviews

AGUSTÍN JOSÉ MENÉNDEZ argues on Nino's Constitution of Deliberative Democracy.

RAIMO SILTALA reviews The International Library of Essays in Law & Legal Theory.

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NOTES • DISCUSSION • BOOK REVIEWS

Constituting Deliberative Democracy*

AGUSTÍN JOSÉ MENÉNDEZ

The *Constitution of Deliberative Democracy* is a major treatise based on one of the two manuscripts¹ which Carlos Santiago Nino completed before his tragic death.² Although the text is not completely original (some of its arguments were already known to Nino's readers), it constitutes the most sophisticated statement of the author's many contributions to legal and political theory.

More specifically, it deals with three complementary topics. First, it offers a theory of legal validity within the framework of general practical reasoning. Second, it puts forward a sketch of the constitutional essentials of a good society. Third, it sets out the institutional arrangements which are appropriate to such a constitutional order.

I. The Legitimacy of Law

Any theory of law implies a theory of the legitimacy of law.³ To put it differently, any theory of law presupposes some account of what renders legal norms *valid*.

* This essay reviews *The Constitution of Deliberative Democracy* by Carlos Santiago Nino (1996a), hereafter referred to as *The Constitution*. The author expresses his acknowledgement to Prof. Massimo La Torre, who read with a generous, critical and patient spirit the different drafts of this essay. Many thanks also to Mariano Aguas, Julio Baquero, Edoardo Chiti, Andrés Malamud, Espen Olsen, Marcelo Oviedo, Elena Rodríguez, Pedro Teixeira and Sergio Toro.

¹ The second (Nino 1996b), deals with the historical, political, legal and normative dimensions of the punishment of mass violations of human rights.

² For a biographical notice, see Malem Seña (1995).

³ Nino understands legitimacy as a matter of validity. This presupposes a distinction between good reasons as valid ones and good reasons as persuasive ones. Cf. Weinberger 1994, 242.

Nino's own theory is a complex one, which can be said to be three-fold. First, he settles the question of which are valid reasons for the purpose of determining whether legal norms are or are not legitimate ones. Second, he renders explicit the criterion of moral correctness implicit in his conception of valid reasons. Third, he argues that we cannot determine the validity of any legal norm by a direct assessment of its qualities; on the contrary, he argues that we need to consider such issues in the framework of the legitimacy of the legal system as a whole.

Let's move back to the first question, namely which kind of reasons must be used when assessing the legitimacy of law. His argument on this point is a sophisticated reformulation of ideas which he had been endorsing for years, at the very least since the late seventies, and more specifically, since his *fundamental theorem of legal theory*.⁴ Nino starts by denying that law can be regarded as the source of its own validity:

A Constitution can assign validity to other rules only if it itself is valid, but it cannot be the basis of its own validity [...] Since the Constitution cannot ascribe validity to other rules if it is not itself valid, and since it cannot ascribe validity to itself, the Constitution cannot on its own grant validity to other rules. (Nino 1996a, 26–7)

That is so because legal norms are not conclusive reasons. Legal arguments do not meet the requirements for qualifying as primitive operative reasons. The latter are characterised by being autonomous (that is, their validity does not depend on who has formulated or accepted the reason), universal (meaning that if they are accepted to evaluate a situation, they should also be admitted when dealing with a situation which does not differ from the former in a relevant way), supervenient (the property which justifies discriminating between two situations, to the effect of applying an operative reason, must be not only generic, but also factual) and integrative (reasons are all mutually comparable and subject to a hierarchical order). These are not features of legal norms. They are based on an authoritative pedigree, they are not necessarily universal (can be limited either in time or space) and they are not supervenient and are difficult to integrate with other justificatory reasons (Nino 1984, 496–98). If that is so, only *moral* reasons can be seen as primitive operative reasons. Consequently, they are the ones which must be used in order to argue for the legitimacy of the legal system. This is the basic content of what Nino styled as the *fundamental theorem of legal theory*:

[L]egal norms do not by themselves constitute operative reasons for justifying actions and decisions (like those of judges) unless they are conceived as deriving

⁴ It is not easy to determine when Nino started to reconsider the basic premises of the positivist paradigm in which he had been trained. We can find an open criticism of some aspects of positivism in Nino 1974 and 1980. The theorem is formulated in a rudimentary way in Nino 1984. It is clearly stated in Nino 1985, ch. 10. In Nino 1995 we can find a detailed analysis of the different connections between law and morality. At any rate, it is probably not too adventurous to say that the tragic experience of dictatorship had an influence on Nino's legal theory. On this, cf. Nino 1996b, ch. 2.

from moral judgments-normative propositions that exhibit the traits of autonomy, justificatory finality, universalizability, generality, supervenience, and publicity. (Nino 1993a, 811)

Having established that the ultimate justification of a legal norm depends on the moral reasons which can be provided in its support, we can move to the second step of Nino's argument, namely, what should be the yardstick of moral correctness against which we should pass judgment. Nino regarded himself as an ethical constructivist (cf. Nino 1989). In negative terms, he challenged any determination of moral correctness by reference to correspondence with empirical facts. That is, he denied that moral truth was hidden somewhere in the world waiting for us to discover it. In positive terms, he regarded moral correctness as a conceptual question. According to him, morality is to be conceived as a social practice which fulfils certain social functions, the main ones being conflict solving and social coordination in order to achieve complex social goals. Conscious of the shortcomings of both cognitivism and non-cognitivism, he opted for a moderate form of cognitivism. That he characterized as *epistemic constructivism*. According to it, moral correctness is to be determined by reference to counterfactual and not to factual criteria. The key criterion is that of "the hypothetical acceptability of such principles, by all those who might be affected by them, under ideal conditions of impartiality, rationality and full knowledge of the relevant facts" (Nino 1989, 68; 1991b, 42). Nino is clearly influenced by Kantian philosophers, and *The Constitution* and his previous publications on the matter are at the core of "deliberative democracy."⁵ More specifically, the affinity with Habermas (cf. Habermas 1975, 1996) and his linguistic turn is clear (cf. Nino 1991a, 247, fn 22). Both authors assign a central role to the pragmatic assumptions we make each and every time we enter into practical discourse.

Before moving forward to the third limb of Nino's theory of legitimacy of law, we should make clear what these two first premises do not imply.

First, the fundamental theorem of legal theory does not say that any legal norm, in order to qualify as a valid one, needs to prescribe what would be morally correct in the concrete circumstances to which the norm is applicable. There are reasons for having legal norms that go beyond their *primary* substantive correctness. Thus, the fundamental theorem of legal theory is not to be understood as an argument for natural law theories.

Second, it also denies that law can be regarded as *pure*, as some variants of legal positivism pretend. Nino's theory of law envisages complex connections between law and morality. His standing on such matter corresponds, in general terms, with one characteristic of Alexy's theory of law, and more specifically, of his special case thesis. For both authors, legal reasoning is a

⁵ On deliberative democracy in general terms, see Cohen 1989, and Benhabib 1996. Two major collections of essays are Estlund 1997, and Elster 1997.

special case of general practical reasoning (Alexy 1989, 15–6, 212ff.; Alexy 1999; Nino 1992, 28; 1993a, 814; 1994, 31). This implies that law is neither superfluous (to the extent that it *adds* something to morality) nor completely autonomous from morality. On the one hand, there are very good reasons for complementing morality with law. To start with, moral reasoning is not enough to guide our action. It contains only very general principles, so that it is very difficult and complex to decide practical questions exclusively on the basis of moral reasons. This explains why Nino denies that “there is a moral system wholly independent of the social practices involved in the constitution, recognition, and exercise of government, so that the moral citizen who has resort to it in order to justify his obedience to government and its law can reach conclusions about what we should do without taking those practices into account” (Nino 1991a, 245–46). To put it differently, practical reasoning cannot be exclusively based on pure moral reasoning, if only because what is correct depends *sometimes* on previous conventional decisions (especially, on what concerns the coordination of behaviour). The moral correctness of certain patterns of behaviour depends on what has been legally prescribed (Honoré 1992). A second reason to complement morality with law is that moral discussion might be too cumbersome to provide intersubjective standards of behaviour. Moral reasoning can be inconclusive. Nino argues that unanimity can be a recipe for avoiding taking decisions on practical questions: “there are critical circumstances in which a course of action must be adopted in the absence of unanimous consensus. In such a situation, to insist on the need for consensus implies favouring the minority who are for preserving the status quo, that is, not adopting any decision. Therefore, in these cases a time limit for adopting one or the other decision must be established and the decision procedure which is closest to unanimous consensus should be preferred” (Nino 1991a, 248). Law emerges as the complement to morality which can deal with its inconclusive character. The legal system increases exponentially certainty about which are the norms according to which action will be coordinated; if that was not enough, it provides further motivation to comply with common action norms. On the other hand, it is necessary to keep in mind that moral reasons are the only trumps in general practical reasoning. To quote the Argentinean philosopher once again: “Legal reasoning is a special kind of moral reasoning which is characterised by the fact that it takes into account (as relevant facts) the validity of certain norms [...] The differentiation of law from morality is based on the specific criteria of recognition of a norm as belonging to the legal system” (Nino 1985, 63, 59). That means that law and morality might depend on each other, but are differentiated orders. It implies that conflicts might arise between what is legally and morally prescribed. After all, the drafting of common action norms following the grammar of law gives rise to positive norms which offer a better alternative than fresh moral judgment in order to solve conflicts and promote

coordination. Because they constitute an *alternative* to moral reasoning, it might be the case that they might enter into conflict with it. Thus, there might be cases in which the acting individual might not find good reasons to follow legal norms, so that a gap might open between the autonomy of morality and the heteronomy of law.

This moves us into the third step of Nino's argument on the legitimacy of law, which consists in characterising the judgment on the obligation to obey the law as a two-fold one, closely related to the different ways in which law and morality are connected.

Nino rejects any simplistic account of the legitimacy of law. This implies rejecting both *philosophical anarchism*, or the denial of the legitimacy of law on the basis that it unavoidably pre-empts the exercise of our individual autonomy, and any kind of *ideological positivism*, which attributes law's legitimacy to its role as the guardian of security. Dealing first with the latter, we can say that the argument that any legal system is to be preferred to anarchy is fallacious. It is based on the premise that even a wicked legal system stabilises a pattern of behavioural expectations, and that is something which is lacking in an anarchical state. Nino counter-argues that there are cases in which the legal system is a worse alternative than anarchy (Nino 1990a, 197–209). Moving to the former, he finds quite artificial the tension between law and individual autonomy. That is to be partially blamed on the concept of autonomy which is presupposed by philosophical anarchists. It basically corresponds to the ideal of free will. This extends to political matters the kind of autonomy characteristic of moral reasoning. But this is a major mistake. When dealing with the legitimacy of law, we are concerned about what autonomy and self-determination should mean and imply *within the political realm*. If that is so, we cannot escape two basic premises. On the one hand, the determination of which questions are to be dealt with politically is something which should not be decided by the free will of individuals, but it depends on whether or not the consequences of a given action or institution affect a plurality of persons.⁶ On the other hand, we must give sufficient consideration to the right to autonomy of other individuals. That requires that we put forward arguments which can be accepted by others, or what is the same, reasons that others can scrutinise and accept in exercise of their own autonomy (Nino 1991a, 235). It is on such double grounds that we can assert that there must be a difference between the requirements of autonomy in purely personal matters and in those cases in which a plurality of persons is affected. *Political autonomy must be seen as a matter of participation*. Consequently, its normative ideal should be that of equal and symmetric participation in deliberation and decision-making. Nino summarises it in the following way:

[Autonomy] would not be achieved by the mere unreflective and isolated decision to adopt a moral principle, but by the free participation in a discussion which is as

⁶ This idea can be traced back to Dewey 1984, 243–44.

broad and reflective as possible and which tends to reach a unanimous consensus or its substitute (majority agreement) without precluding the possibility of revising that results any time it can be shown that it does not coincide with the hypothetical result of an ideal consensus. (Nino 1991b, 49)

That is a good base from which to challenge philosophical anarchism. That is so because it shows why we should not be interested in a maximalistic defence of autonomy, but in finding out which institutional structures allow us to attain the highest possible degree of self-determination.

The key element in Nino's conception of legitimacy is that of the *epistemic privilege of democracy*. If the procedure of deliberation and decision-making of common action-norms satisfies the conditions under which it can be asserted, then it will bridge the gap between individual morality and law as an authoritative and institutional social practice.

The reader might recall that Nino defined moral correctness by reference to counterfactual criteria, namely, the outcomes of deliberation under ideal conditions. The fact is that once we become aware of the many shortcomings of deliberation under non-ideal conditions, we cannot consider the outcomes of real-world deliberation as the oracle of moral correctness. On the one hand, real-world discussants tend to be partial, they cannot be described as fully rational agents and they have not all the relevant information at their disposal. On the other hand, decisions are not approved by unanimity, but by more or less qualified majorities. If that was not enough, we have to take into account the point that decisions are taken within very short periods. If that is so, one could wonder what we can expect from real-world deliberation. Is it not just naïve to build up a theory of legitimacy around deliberative democracy when all deliberative structures are so far away from their ideal? The answer consists in showing that legitimacy is a matter of degree. Deliberation under ideal conditions is not a feasible alternative, but a regulative ideal (Alexy 1998, 109). The conditions under which we can assert the epistemological privilege of democracy are not only those of an ideal world. We can affirm that a given political procedure is epistemologically privileged to the extent that it can be seen as a proxy of ideal deliberation. This requires that a certain set of conditions be complied with: There must be a certain affinity of interests between the constituency and its representatives, public deliberation should be structured around public reasons and deliberation should refine and transform pre-political preferences (cf. Nino 1996a, 43; Cohen 1989; Sunstein 1997; a more elaborated analysis can be found in Nino 1993a, 822).

If those are the relevant conditions, democracy can only pretend to enjoy an epistemological privilege. That is so because only this political procedure is structured around deliberation and majoritarian decision-making. The former fosters giving "due weight to the interests of everyone affected by a course of action" and also noticing "the deficiencies in reasoning which lead to certain moral positions" (Nino 1991a, 252). The latter promotes "a process

of negotiation which pushes towards impartiality, and this makes the results of collective procedure in general probably more impartial than the decision which would have been reached through a procedure which gave prominence to the opinions of a person or a group" (Nino 1991a, 251).

The affirmation of such privilege is essential in order to overcome any kind of scepticism concerning the existence of better or worse procedures for deliberation and decision-making. To the extent that it claimed that only moral reasons constitute ultimate reasons for action, the fundamental theorem of democracy could be seen as implicitly leading to such scepticism (Nino 1991a, 232).⁷ To the extent that deliberative democracy is the most accurate source of correct (in political terms) decisions, we have a reason to overcome it.

However, the epistemological privilege has its own limits. First, it applies exclusively to intersubjective matters. If the consequences of a certain action affect exclusively or mainly a single person, she must be the one to decide what to do (Nino 1990d, 29; 1991a, 131ff.; 1993a, 887). Second, we must distinguish between the conditions which must be satisfied in order to affirm the epistemological privilege of democracy and the substantive issues to be decided politically. The former can be the object of *a priori* knowledge, while the latter are the proper object of *a posteriori* knowledge. This basically implies that the individual can come to solid opinions on her own, without the need of bowing to the results of democratic deliberation, on what regards the preconditions of the epistemological privilege of democracy. That is, the epistemological privilege does not extend to the conditions of its own applicability. To quote the author himself:

It is conceivable that an individual reaches more correct solutions in isolation than by collective discussion [...] The probability that correct solutions are reached by individual reflection increases when referring to the preconditions for the validity of the collective procedure. (Nino 1996a, 116)

The privilege applies on what regards *a posteriori* knowledge. The complex web of factual and normative premises cannot be weighed and balanced by the individual in her privacy, but should be entrusted to public deliberation:

In so far as many of the people involved in the conflict participate in the discussion, in so far as they represent the divergent interests, life plans, and inclinations which could have generated the conflict, and in so far as there has been a broad debate in which the relevant information has been set forth, and the people have argued in a rational way—in so far as all of that has taken place, any unanimous consensus reached in the discussion enjoys a strong presumption that it coincides with the consensus that those involved in similar conflicts would have reached under ideal discussions [...] There is no such guarantee when individuals in isolation reflect about moral issues or when discussion is limited to a few people with similar idiosyncrasies. (Nino 1991a, 163)

⁷ And cf. also Hayek (1960, 403), to whom what mattered was not who ruled, but what government was entitled to do.

This way of structuring moral knowledge resembles the premise which Alexy borrows from Radbruch, namely that extremely immoral norms are not law (cf. Alexy 1989, 1994). That is so to the extent that the latter is based on the assumption that we can be certain about what is extremely wrong. Combining Nino's and Alexy's terminology, knowledge on extreme injustice is *a priori* knowledge.

Finally, Nino argues that any judgment upon the legitimacy of legal norms must be, at the very least, two-fold. First, we should consider whether there is a general obligation to obey the law. Second, we should proceed to consider whether there is an obligation to obey the specific law at hand, taking into account, if the answer to the first question was positive, the strong presumption derived from the existence of a general obligation to obey the law.

Let's analyse this in more detail. The legitimacy of law is usually contested within the context of deciding whether there is or there is not a general obligation to obey the law. The latter is a practical question. It arises when, within the context of a roughly fair legal system, we face what seems to us as an *unfair* norm. By means of structuring our practical reasoning with the help of the concept of the general obligation to obey the law, we avoid having to pass a fresh judgment on every occasion. Moreover, we acknowledge that law is a social practice, the value of which transcends the substantive merit of each particular norm. To put it differently, by means of structuring our reasoning with the help of the general obligation to obey the law, we recognise that the legal system as a whole is essential in discharging the basic social functions of conflict solving and coordination of action in order to achieve complex social goals.

The answer to this first question depends on whether common action-norms have been decided according to a procedure which can be said to enjoy an epistemic privilege, or what is the same, if they have been established democratically. That is, the existence of a general obligation to obey the law is clearly related to the choice for deliberative democracy as the legitimate political system. If the answer is positive, we have established a strong presumption in favour of the legitimacy of the legal system, and as a consequence, of complying with its norms. But, of course, the answer can be a negative one:

The fact that the legislator or judge could not have dictated his law or sentence without a legal order to grant him authority does not in itself imply a moral restriction on his decisions, since the legal order may be so bad in comparison with the ideal constitution that it is necessary to take advantage of that authority in order to destroy it. (Nino 1996a, 37–8)

Once we have decided upon the existence of the general obligation to obey the law, we must move to the second limb of the question, namely, we must determine whether there is an obligation to obey the concrete norm which is applicable to us in a concrete context. The question must be decided in the

framework provided by the answer to the first question. An affirmative answer implies a very strong presumption in favour of a positive answer to the second. That is so because the primary reasons based on the substantive merits of the concrete norm at stake are reinforced by the weighty reason that the norm can be regarded as the outcome of a legitimate procedure of decision-making. That notwithstanding, it is clear that the second limb implies a substantive moral question. The individual cannot escape taking, implicitly or explicitly, a decision. She remains the final judge, even if assisted by highly structured practical reasoning.

In this section we have learnt about the tension between the validity and the legitimacy of law. We have reviewed some of the essential concepts of Nino's legal theory, like the fundamental theorem of legal theory, the obligation to obey the law and the epistemological privilege of democracy. The practical relevance of these issues fully unfolds when they are considered within the legal practice of a good society, or more specifically, when we try to sort out the different ways in which we can ease the tensions between rights, democracy and law. These questions are among the ones dealt with in the next section.

II. The Legal Practice of a Good Society

Nino argues in *The Constitution* that the legal practice of a good society should combine rights, democracy and the rule of law. That means that liberal rights should be protected, decision-making should be based on democratic deliberation and the historical constitution should be observed. Not surprisingly, his contribution is not limited to such a general statement (which might sound like the taking coal to Newcastle), but it consists in a detailed analysis of how the tensions between the three elements can be eased.

To start with, it is argued that there is a mutual relation of dependency between the three of them. Thus, we can argue that any practice of moral deliberation implies the acknowledgement of certain rights to participants in practical discourses; at the same time, it presupposes a normative framework which provides for the stabilisation of behavioural expectations. And so on. It is in this sense that it is appropriate to envisage the relationships between these three elements as a "full circle" (Nino 1996a, 220–21). This implies also a permanent conflict among them. Rights, democracy and law are in a permanent tension (for a similar argument, cf. La Torre 1995). Given that Nino did not believe in the feasibility of an exact social science (on the scientific character of social disciplines, see Otero 1985), he did not expect to find a way to square the circle and completely eliminate such tension. What he considered feasible was to ease it by means of practical reasoning (Nino 1996a, 222).

Power in a good society should be *programmed* by the outcomes of the process of democratic deliberation. These acquire an institutional formulation

by means of a transformation into legal norms. As has been said, we can assume that democracy, if certain conditions are satisfied, enjoys an epistemic privilege. This allows to bridge the gap between the autonomy of morality and the heteronomy of law.

A summary analysis of the conditions which must be satisfied in order to affirm the epistemic privilege of democracy suffices to make clear that the practice of deliberation is *constituted* by rights. On the one hand, entering practical discourse implies acknowledging in all participants a series of rights (at the very least in what concerns the discursive practice). This implies that without such mutual recognition of rights, deliberation is just not possible. On the other hand, a basic condition for affirming the epistemological privilege of democracy is the respect for basic rights (Nino 1996a, 64, 138 and 200–1).

According to our author, the basic rights which underpin the social practice of moral discussion are autonomy (which points to the intrinsic value of personal self-determination, in its double dimension of inter-subjective moral principles *and* ideals of personal excellence), inviolability of the person (which precludes burdening the individual against her own will) and dignity (which requires that we are free to assume the consequences of our own decisions, and thus renders possible a dynamic exercise of our rights). Nino is positive about the fact that “social rights” (such as the right to health, to proper shelter or a fair income) must be considered as part and parcel of the practice of a good society. They play a key role in easing the tension between the three components of deliberative democracy (that is, between rights, democracy and the rule of law).⁸ This is not to be interpreted as a demise of classical liberal rights, which are fundamental even in the absence of such social rights (see Nino 1996a, 63). He is even aware of the fact that the recognition and protection of social rights increases the tension between rights and democracy, to the extent that it might result in the reduction of the scope of action for democratic decision-making.

The Constitution contains an enumeration of some fundamental rights:

[i] the right to life, [ii] freedom of expression, [iii] freedom of conscience, [iv] liberal education, [v] privacy and intimacy, [vi] personal property and work, [vii] commerce and industry; [viii] positive guarantees of the state to guarantee equal autonomy, equal treatment and freedom from illegitimate discrimination. (Nino 1996a, 219)

This is not intended as a detailed bill of rights, but only as a rough catalogue. The concrete formulation of the bill of rights is the task of the legal practice of a good society, or what is the same, of the historical constitution or the constitution as a social convention. This is defined as the regularity of

⁸ Nino’s defence of social rights is closely related to the importance he gives to the opportunity dimension of personal autonomy and to the partial acceptance of omissions as a source of violations of rights. On the different dimensions of autonomy, see Sen (1993). On the need for a normative and not merely factual distinction between action and omission, see Nino 1984, 32, 1990a, 1990c, and 1993b.

conduct, attitudes and expectations of successive legislatures, government officials and generations of citizens.

The historical constitution plays a major role to the extent that any meaningful deliberation presupposes a pre-existing social practice of deliberation. In its turn, that is shaped by the historical constitution. It stabilises behavioural expectations. By doing so, it gives rise to a minimum framework within which it is possible to start (and to engage in) moral discourse.

However, we should not forget that law is a social practice. As such, the historical constitution is not different from any other social practices. Consequently, it is plagued by uncertainties and contradictions. This makes legal reasoning dependent on general practical reasoning, and especially, on moral reasoning. That can be seen as an opportunity to introduce a critical dimension at the core of law, and to reduce the gap between the historical constitution and the ideal one:

[I]f the current constitution has any value at all, it is in the potential of being reformed and perfected, a possibility not offered by other unrealised and unrealisable utopias. (Nino 1996a, 37)

Moreover, the determination of the precise scope and content of rights takes place in the context of the historical constitution. This must not be constructed as the claim that we can only talk of rights as positive rights, but as the assertion that the precise definition of rights is undertaken by democratic deliberation.⁹ In such a way, we can affirm both rights and democracy and we avoid the risk of suffocating democracy by a too *thick* conception of rights:

we must confront the problem that a robust theory of rights, ostensibly supported by reasons to which anybody may have access, pushes the democratic procedure out of the moral realm [...] We must try not to make the democratic procedure so perfect, by strengthening its preconditions to the maximum, that its scope of operation shrinks so much that it embraces almost nothing, but coordination problems like the direction of traffic. (Nino 1996a, 65, 138–39 and 222)

There are many affinities between Nino's theory and the arguments put forward by most ethical constructivists. His argument is especially close to that of Habermas. They share some very basic intuitions. For example, Nino and Habermas try to reconcile public and private autonomy by means of conceptualising the relationship between rights and moral deliberation as one of mutual dependency (cf. Habermas 1995, 140; Gerstenberg 1998, 208). Similarly, they are quite concerned about the *trivialisation* of the political realm that will result from a non-political definition of rights, or what is the same, from subtracting the definition of basic rights from the scope of political decision-making.

⁹ Nino is trying to find a way of overcoming the idea of rights as external limits to democracy.

That notwithstanding, Nino has a more individualistic conception of rights. While Habermas and other *discourse theorists* seem to move towards a consensual approach on matters of moral correctness, Nino claims that deliberation is the safest route to formulating morally correct judgments, but that individuals might establish morally correct formulations even if reasoning on their own (Nino 1996a, 114–15), especially on what concerns “the preconditions for the validity of the collective procedure” (Nino 1996a, 116). That “individualistic turn” places Nino home and dry as far as a good deal of the criticisms addressed to Habermas on the basis of his consensual theory of truth are concerned.¹⁰

III. Towards the Normative Ideal: Deliberative Democracy

In the last two chapters of *The Constitution*, Nino offers a description of the institutional arrangements which could both guarantee the stability of the *good society* and help close the gap between the positive legal system and the normative ideal of deliberative democracy. These chapters are a genuine exercise in institutional imagination. Questions like those of political representation, federalism or the value of referenda are dealt with in some detail.¹¹ We can also find precious remarks on the tension between democracy and stability. That notwithstanding, it can be said that the most interesting chapter is the last one, devoted to the normative and political analysis of judicial review.

Nino was of the opinion that the real cause of the *crisis of democracy* was not the excessive engagement of citizens in public matters (as some social scientists have claimed),¹² but political apathy, or what is the same, the lack of concern for public affairs.¹³

In order to overcome such crisis, we need to do several things. But the main one is to foster *participation*. It must be granted that any form of representation is far from ideal, as it pulls democracy away from moral discussion’s maximum epistemic value (Nino 1996a, 146 and 171). But it is no less true that representative democracy is a proper way to institutionalise public deliberation. That is so, among other reasons, because it offers a feasible institutional framework for ongoing public deliberation. It creates the conditions under which dialogue on public matters can continue after citizens go to the polls. Thus, representation is both a blessing and a curse.

¹⁰ Against, cf. La Torre (1999). Major criticisms of Habermas’ consensual theory of truth in Weinberger 1992, 1994, 1996a, 1996b, 1999.

¹¹ These issues are dealt with in more detail in Nino 1992, ch. 3. However, the analysis is focused on the Argentinean case.

¹² Cf., among others, Crozier, Huntington, and Watanuki 1977.

¹³ Cf. Nino 1991c, 17–8. In this text, he severely criticises Huntington and other political scientists, and argues for a conception of democracy as deliberation, as a procedure through which we can test and transform our pre-political preferences.

That granted, we will do well to combine it with other institutional arrangements, to the extent that they can mitigate its shortcomings. That is, we need institutional imagination to reinforce and complement representation, so that we can bridge the gap between the people and its government (cf. La Torre 1995).

From these premises we can come to the conclusion that electoral systems should be designed in such a way as to foster the representation of plural interests. In practical terms, this constitutes a weighty reason to prefer parliamentary to presidential systems (cf. also Nino, 1991c). Similarly, it is necessary to work out mechanisms that guarantee that representatives take care of the interests of their principals.

On what concerns the spatial allocation of power, Nino was clearly favourable to federalism. By means of decentralising decision-making as much as possible, we increase the chances that democratic decision-making leads to correct (in political terms) decisions, or what is the same, we move closer to the conditions under which democratic procedures can be said to enjoy an epistemic privilege (Nino 1996a, 153). That does not mean that there are no risks in decentralisation. He was aware of them and was ready to advocate institutions that could ensure a certain degree of central coordination and of social and economic homogeneity. Thus, he favoured a mixed polity in which deliberation took place at the local level, law-making at the central one and the implementation of law was the responsibility of local authorities (Nino 1996a, 170).

He was quite sceptical about the possibility of increasing democratic participation through a more frequent resort to referenda. The argument goes that the kind of public deliberation which takes place before them is too narrow (as a general rule, it is exclusively focused on the specific issue at stake). Moreover, referenda tend to impoverish public deliberation, as opinion gets polarised into two mutually exclusive options. It is not surprising that they give rise to political manipulation by political elites (Nino 1996a, 147–48).

A question which Nino was extremely worried about was the one concerning the limits that stability imposes upon transformative political action. To put it differently, the extent to which the need to ensure political stability should limit attempts to transform societal arrangements towards the normative ideal of deliberative democracy. His years as Alfonsín's advisor make him aware of the fact that transitory justice is indeed a special kind of justice. He argued that a major concern of democrats should be avoiding the risks of involution. This might require compromising if the forces of reaction fear political participation *and* they are in a position of power (Nino 1996a, 159). In such cases, Nino was of the opinion that it was necessary to give sufficient weight to prudential arguments which prescribe postponing certain democratic transformations in order to preserve or make possible democracy itself. It is in such light that we

can understand and even approve Alfonsín's concern with limiting the attempt at retroactive justice in order to make it possible (cf. Nino 1996b, ch. 2).

As was said before, his most complete set of reflections was devoted to the judicial review of legislation. It is well known that the role of courts as guardians of the constitution has been the object of a myriad of monographs. American lawyers have dealt time and again with the so-called *counter-majoritarian* difficulty. Europeans prefer to tackle the issue under the perspective of the *gouvernement des juges*. At any rate, the question seems to have become a central one in the institutional design of democracies. Nino had developed a quite original argument on the matter. To understand his arguments better, the reader might allow me to summarise some of the *general* arguments for and against some other scholars.

Some authors praise judicial review as an essential ingredient of democratic systems. For example, Ronald Dworkin has put forward a vigorous defence of judicial review. He argues that conferring to judges the power to quash legislation on the basis of its unconstitutionality is absolutely necessary in order to avoid the *crisis of democracy*. It is relevant to quote at length an excerpt from his recent *Freedom's Law*:

In some circumstances [...] individual citizens may be able to exercise the moral responsibilities of citizenship better when *final decisions are removed from ordinary politics and assigned to courts*, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence. (Dworkin 1996, 30)

Bruce Ackerman has arrived at a similar conclusion, but on board a very different train of reasoning. The Sterling Professor at Yale advocates a dualist conception of democracy. That implies the need to distinguish constitutional moments from ordinary politics. The former will be those periods in which the vast majority of citizens exercise their political rights and support major constitutional reform. These are the moments in which *we the people* speak. The latter refers to those periods in which citizens are mainly concerned about their own business. Because the degree of legitimacy of political actors is in such a context quite limited, they must act within the constitutional framework agreed upon at constitutional moments (Ackerman 1984, 1991, 1998). Judicial review of legislation can be seen as instrumental to such dualistic conceptions of democracy. More specifically, it guarantees that constitutional essentials are respected by ordinary political action. Judges should be empowered to preserve a "democratic floor" under legislation and also to entrench exercises of constituting power by *we the people* which go beyond the formal procedures of constitutional amendment (Ackerman 1996, 210–11).

Another author who has praised the role to be played by constitutional courts is John Rawls, who has gone so far as to claim the Supreme Court to be the most qualified source of public reason: "[I]n a constitutional regime

with judicial review, public reason is the reason of its supreme court" (Rawls, 1993, 231).

But not everyone is enthusiastic about the democratic status of judicial review. In his widely quoted *Democracy and Distrust*, John Ely argues for a much more limited role of judges. According to him, judicial review should bite only in two cases. First, when legislation threatens the chances of equal participation in the political process. Second, when its outcomes do not respect the interests of minorities. Although his conclusions might be based on a certain kind of moral scepticism (cf. Ely 1980, 101 and 154, where he contests whether we can argue for a set of objective moral principles), it is not less true that his argument summarises the uneasy fit of judicial review within a democratic constitution.

Moving back to Nino's argument, it might be said that he offers a quite original line of argumentation for giving a quite limited scope to judicial review.

The reader might recall that he was of the opinion that the only legitimate procedure of decision-making was deliberative democracy. That was due to its capacity to expose citizens to the different opinions and interests at stake and to lead to the reasonable transformation of their preferences (Nino 1996a, 188–89). Having granted that, it is clear that conferring judges the power to quash democratic legislation seems to be at the very least controversial. After all, the tasks assigned by Ackerman or Dworkin to judicial review of legislation might be achieved by means of other institutions of a more democratic character:

The power of judicial review is a contingent arrangement of certain legal systems, which may or may not exist when the system contains a supreme constitution. (Nino 1993a, 811)

However, Nino was aware of the fact that the epistemological privilege of democracy has its own limitations. It is on such basis that Nino builds the case for a limited kind of judicial review. It does not make sense to entrust to majoritarian decision-making the monitoring of whether the conditions to affirm or deny such privilege in certain specific contexts are satisfied. Democracy might be a poor guardian of its own:

[E]xtreme democratism [...] is self-defeating since, as has often been observed, democracy could eat its own tail if certain conditions were not preserved, *even by undemocratic means*. (Nino 1993a, 831; my italics)

This constitutes a satisfactory starting point for a democratic theory of judicial review. More specifically, three will be the basic grounds upon which we could build up a thorough justification of the institution.

Firstly, judicial review (and, for that matter, individual assessment of whether one is under an obligation to obey the law) is justified to the extent

that it is oriented to determine whether the conditions under which democracy can be said to have an epistemic privilege are satisfied:

[S]ince *anybody* has reasons to defer her own moral judgment to the contrary decision by democratic institutions, *anybody* is entitled to determine if and to what degree the conditions that determine the deference (the conditions that ground the epistemic value to the democratic process) are satisfied. A judge has no more legitimation than any citizen who is applying a legal norm for justifying an action or decision and is compelled by the structure of practical reasoning to resort to autonomous moral principle. (Nino 1993a, 832–33)

Secondly, judicial review might result in the quashing of statutes which do not respect the right to autonomy. That could be the case with legal norms which aim at imposing an ideal of personal excellence or virtue. This ground is closely related to the strict differentiation between public and private autonomy.

Thirdly, and finally, the value of the historical constitution justifies nullifying those statutes which contravene it, even if they do not go against any basic moral principle. To the extent that the constitution is open to reflexive improvement, there are good reasons for preserving constitutional essentials. The argument is closely related to the intrinsic limits to any collective work. They render it advisable to defend its present form, even if not ideal. The legal system is the case *par excellence* of a collectively transformed social institution (cf. Nino 1993a, 838; on the limits to collective action, see Nino 1990b).

Conclusion

Reading the *Constitution of Deliberative Democracy* is a good opportunity to revisit Nino's major contributions to legal and political theory. In fact, the book is an authentic *tour de force* which deals with all major questions in contemporary theoretical approaches to law. On what concerns legal philosophy, it reflects the importance that the author gave to his post-positivist turn, and more specifically, to what he denominated as the fundamental theorem of legal theory (which basically says that morality not law provides ultimate reasons for action). Those who have been trained in hard-line positivist law schools surely will appreciate Nino's move. Not that everything fits smoothly: If his life had not come to such a tragic and early end, he might have offered a more detailed account of his legal theory (for example, it would have been exciting to see how he would have described in more detail the relationship between law and morality, and especially, those cases in which law determines or conditions moral correctness). Moving to his political theory, his legacy is at the very least constituted by his analysis of political obligation and his case for democracy. First, his argument in favour of the existence of a general obligation to obey the law is based on a sophisticated argumentation, which results in the

building of several bridges between the heteronomy of law and the autonomy of morality. It takes into account all major insights of liberal philosophy at the same time as it offers a vigorous fresh argument. Second, his case for democracy is a robust alternative to the fashionable (especially in political science departments) pluralist conceptions of democracy. The combination of moral autonomy and the epistemological privilege of democracy is far from being an easy one, but it must be said that his way (and that of other authors on the wavelength of discursive or deliberative democracy) of posing the problem and some of his answers constitute lasting contributions in the right direction. Moreover, his theorising on democracy shows Nino at his best: the committed intellectual with a genuine curiosity for exploring how theory works in practice, and how practice works in theory.

It seems to me that Salinger's young Holden was right when stating that a good book is one which makes us look forward to having the chance to talk at any time with its author. Nino's book will keep alive young Holden's dream, even if he knows that nobody can answer the phone.

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